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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-1855

DIVERSIFIED RESOURCES CORPORATION,

Petitioner,

v.

JOHN BUXTON, et al,

Respondents.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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DIVERSIFIED RESOURCES CORPORATION,

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QUESTIONS PRESENTED

1. Was the District Court of Utah and the Court of Appeals for the Tenth Circuit correct in holding that a statute of limitations had been tolled by a corporation which had sent to the respondent creditor four separate letters of confirmation signed by the company's controller in two instances and by the company's presi-

dent in two instances and stating that a $20,000 debt was shown on the company books as owing to the respondent?

2. Was the District Court of Utah and the Court of Appeals for the Tenth Circuit correct in concluding that the officers of the corporation which signed these letters of acknowledgement were clothed with apparent authority, that the company's directors did not revoke the statements made by the officers, and that the company was therefore bound by the acts of its agents in acknowledging the debt?

3. Was the District Court of Utah and the Court of Appeals for the Tenth Circuit correct in holding that the conduct of petitioner corporation in continually acknowledging the existence of the $20,000 debt was sufficient conduct to justify the failure

of respondent creditor in filing a lawsuit within the four-year statute of limitations and that the conduct thereby estopped the corporation from claiming the statute of limitations as a defense?

PARTIES

Respondent agrees with the statement contained in the Petition for Writ of Certiorari filed by Diversified Resource Corporation as to the make up of the parties in this litigation.

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OPINIONS BELOW

Respondent concurs that the lower court opinions as printed by the petitioner in its appendix are accurate. All references to the lower court opinions in this Brief shall be to the appendix of petitioner.

JURISDICTION

This lawsuit was commenced in the United States District Court for the District of Utah, Central Division, as a diversity case. Respondent concurs in petitioner's statement as to the events transpiring subsequent to the Tenth Circuit opinion.

STATUTORY PROVISIONS

In addition to Utah Code Ann. Section 78-12-44, cited and reproduced in petitioner's brief, the lower court also considered Utah Code Ann. Section 78-12-25(1), which is the Utah four-

year statute of limitations applicable to this type of action.

STATEMENT OF THE CASE

Respondent agrees with most of the facts stated by the petitioner in its Brief. However, there are certain distortions and omissions which require respondent to briefly state those circumstances and events considered critical to this litigation.

The plaintiff in the lower court action, John Buxton, is the father of Robert J. Pinder who was president of Diversified Resources Corporation and its predecessor companies for more than ten years prior to 1972. Depositions filed in the lower court action revealed that Buxton loaned $20,000 to Diversified Resources Corporation because of his son's connection with the company and because of an emer-

gency request. Buxton testified that a note was executed to secure repayment of the loan but that he was unable to locate the note. He was, however, able to produce his cancelled check in the amount of $20,000. Defendant, during the District Court hearing, conceded that the loan in fact did occur in October of 1969. (District Court hearing, March 10, 1977, p. 3, lines 16-18). In addition, Ray Jepperson, controller for Diversified, attested to the fact that the debt in the amount of $20,000 was carried on the books of Diversified from May 1970 through all of 1972. Jepperson also stated in his affidavit that until 1972 the loan had not been repaid.

A deposition of Rex Frazier, a certified public accountant with Touche, Ross & Company which had audited the

petitioner and its precedessors since 1969, stated that a $20,000 debt was shown in the company records from 1971 through 1975.

On July 30, 1971, a letter was sent to respondent John Buxton by petitioner's predecessor U. S. Silver and Mining Corporation stating: "Our auditors are making an examination of our records which indicate we were indebted to you on notes in the aggregate amount of $20,000 as of April 30, 1971. . . ." The letter was signed by Ray Jepperson, the controller of the corporation. Respondent Buxton returned the reply portion of the letter to Touche, Ross and acknowledged that the amount noted was correct and executed the appropriate space. (See Appendix p. 18 of the petition).

On June 26, 1972 a similar letter was sent to Mr. Buxton by Mr. Jepper-

son and again Mr. Buxton returned the form to Touche, Ross acknowledging the correctness of the amount. (Appendix, p. 19).

On June 3, 1974, and May 20, 1975, two additional acknowledgement letters were sent to Buxton signed by William D. Wallace, president of Diversified Resources Corporation. These letters for the first time acknowledged a 7 percent interest rate and showed that as of June 1974 there was approximately $6,400 owing and that in the subsequent year of May 1975 there was approximatley $7,800 owing in interest together with the $20,000 principal.

This action was filed in February of 1976. Petitioner Diversified Resources Corporation filed an answer denying liability on the basis that the statute of limitations had expired and that the action could not be main-

tained. Respondent Buxton claimed a six-year statute of limitations applied since the suit concerned a written note while Diversified claimed that the four-year statute of limitations applied as to an oral contract. In any event, the suit was filed after either statute of limitations had run but subsequent to the receipt of the letters acknowledging the debt.

Petitioner states that Buxton filed a Motion for Partial Summary Judgment and that such motion was heard on March 10, 1977, before the Honorable Willis Ritter and that subsequent to the argument the order was entered. (Petition, p. 5). Petitioner's summary omits to state that the Buxton motion was filed on April 14, 1976--eleven months before it was heard and granted. In addition, on July 14, 1976, petitioner demanded ad-

ditional time within which to continue its on-going discovery. This omission is significant because it points up the fact that petitioner had extended periods of time within which to submit any evidence it had which might have established that a "genuine issue as to any material fact" existed.

Petitioner's summary also omits any reference to the fact that petitioner's objections to the partial summary judgment were argued to and rejected by two other judges on two other occasions: Judge Kane of the Unted States District Court for the District of Colorado sitting by special designation heard arguments on April 12, 1978. Judge Brimmer of the United States District Court for the District of Wyoming sitting by special designation heard arguments on February 3, 1979. Thus, although the sparse and

materially incomplete summary in petitioner's statement fails to suggest it, the partial summary judgment granted by Judge Ritter was reviewed by three other federal judges at four hearings.

Accordingly, Judge Bruce Jenkins on February 8, 1979, entered the amended order granting partial summary judgment and findings, determination, certification and direction pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. (Appendix pp. 14-17). An appeal was taken to the Tenth Circuit Court of Appeals which, on November 25, 1980, entered its decision affirming the decision of the District Court. (Appendix pp. 1-13).

Petitioner requests that this Court grant certiorari from the District Court decision and the Circuit Court decision both of which found

that the statute of limitations was tolled by the series of confirmation letters sent to respondent.

REASONS FOR DENYING WRIT OF CERTIORARI

POINT I

CERTIORARI SHOULD NOT BE GRANTED UNDER SUPREME COURT RULE 17, AS AMENDED, FOR CONFLICTS BETWEEN A COURT OF APPEALS AND A STATE COURT NOT INVOLVING A FEDERAL QUESTION.

In its Brief, petitioner maintains that the Tenth Circuit Court of Appeals failed to follow the correct interpretation of Utah law as formulated by the Utah Supreme Court regarding acknowledgement of debts sufficient to toll the statute of limitations. Petitioner asserts that the Court of Appeals disregarded Utah law which requires an intentional acknowledgement and requires a showing of authority to make such acknowledgement. (Petition, pp. 7-14).

Rule 17 of the Supreme Court rules was amended on April 14, 1980, and became effective on November 21, 1980. This rule eliminated the language contained in former Rule 19(b) which stated that certiorari could be granted when a federal court of appeals "has decided an important state or territorial question in a way in conflict with applicable state or territorial law." The adoption of Rule 17 by this Court eliminates the first ground asserted by petitioner for granting certiorari, namely that there exists a conflict between the federal circuit court and the decisions of the Utah Supreme Court. Hence, the discussion concerning the applicable law and cases are irrelevant under the new amended rules.

POINT II

EVEN ASSUMING ARGUENDO THAT A CONFLICT BETWEEN A FEDERAL COURT OF APPEALS AND A STATE COURT IS STILL RELEVANT, THE COURT OF APPEALS DID NOT DEVIATE FROM ESTABLISHED UTAH LAW CONCERNING ACKNOWLEDGEMENT OF A PREVIOUS DEBT.

Even if it were assumed that the 1980 amendment had no effect upon the previous grounds for granting certiorari, a review of the authorities cited together with the undisputed facts in this case shows that the circuit court did not deviate from established Utah law.

The Salt Lake Transfer Co. v. Shurtliff 30 P.2d 733 (Utah 1934) cited by petitioner [Petition p. 8] is in complete accord with the findings of the District Court and the Court of Appeals. In that case the Utah Supreme Court reviewed the history of the Utah statute allowing an

acknowledgement to toll a statute of limitations. The Utah court discussed various Kansas decisions relating to the Kansas statute from which the Utah statute was patterned. The Utah court noted that the Kansas court required an intentional showing of the acknowledgement. However, this "intention" could be derived from the document itself.

This Court in City of Ft. Scott v. Hickman, 112 U.S. 150, interpreting the Kansas statute and citing a previous decision, stated:

> An acknowledgement of an existing liability, debt or claim within the meaning of the Kansas statute, implies a meeting of minds, the right of the creditor to take what is written as an acknowledgement to him of the existence of the debt, as well as the intention of the debtor, as deduced from the contents of the writing and all the facts accompanying it, to make such acknowledgement.

112 U.S. at 163.

The Utah Supreme Court in Salt Lake Transfer Co., supra at 737, quoted with approval the preceding language from City of Ft. Scott, supra, and concluded that the letter in that case was not sufficient to toll the statute since there was nothing in it that admitted a present debt for which the writer was liable.

The Utah court has also noted that questions involving the tolling of a statute of limitations are questions of law for the court to decide. Beck v. Dutchman Coalition Mines Co., 269 P.2d 867 (Utah 1954). This is done by examining the actual documents which are claimed to have tolled the statute.

In Beck, supra, for example, the Utah Supreme Court found that the phrase contained in a letter "we feel that the enclosed check for $1,000

is a very liberal one to compensate the payment for your services to this date" was a sufficient acknowledgement of an existing debt to toll the statute of limitations as to an attorney's fee. On the other hand, as previously pointed out, the Utah Supreme Court felt the language contained in a letter in Salt Lake Transfer Co., supra, was insufficient to toll the statute.

Other decisions cited by petitioner support the position that the Utah court will examine the document itself to determine the intent of the writer. In Weir v. Bauer, 286 P. 936 (Utah 1930), the Utah court concluded that an annual report and an annual tax report were not sufficient to toll the statute of limitations when they were not signed on behalf of the corporation and were not delivered or

intended to be delivered to the plaintiff. However, the court concluded that a contract executed on behalf of a corporation and given to the plaintiff stands on a different footing. The court noted:

> The acknowledgement so made specifically referred to the debt or obligation in question and to the amount thereof. It was not an acknowledgement to a mere stranger. All parties concerned were parties to the agreement which was subscribed by all of them, and bonds by each regarded and acknowledged as an existing liability of the corporation.

Id. at 286.

Finally, in O'Donnell v. Parker, 100 P. 1192 (Utah 1916), the court concluded that the listing in a bankruptcy schedule of a debt which had lapsed was not sufficient to toll the statute since the listing was not intended to be communicated to the creditor, but was done merely because it was required to accomplish bankruptcy.

The court noted:

> To say that there is no difference between writing a personal letter by a debtor to his creditor in which the former acknowledges the existence of the claim and in filing a schedule of his debts under the rules governing bankruptcy proceedings is to lose sight of substance and be governed entirely by forms.

Id. at 1195.

Thus, Utah law is clear that the question of "intent" can be ascertained by the court as a matter of law from the document itself and from the purpose of such document. In the case at bar respondent John Buxton received four separate letters personally addressed to him and signed by either the controller or the president of the petitioner or its successor, which letters stated: "Our auditors are making an examination of our records which indicate we were indebted to you on notes in the aggregate amount

of $20,000 as of. . . ." It is hard to believe that a more direct and straightforward statement acknowledging a debt could be made. In addition, the letters were sent to Buxton and not to third parties or filed in any type of court proceeding.

As a matter of law, therefore, the court properly concluded that the document written by the petitioner constituted an intentional acknowledgement of the existing debt sufficient to toll the statute. To hold otherwise would completely ignore the language of the letters, which cannot be done in the absence of allegations of fraud, mistake, or misrepresentation. The record is void of any claims made by petitioner of any such defenses even though there was obviously ample opportunity to develop facts upon which such defenses could be based.

Petitioner next contends that the Tenth Circuit Court of Appeals failed to follow Utah law in requiring that a corporate officer must be authorized to make an acknowledgement if it is to be sufficient to toll the statute of limitations. (Petition, p. 11-14). Petitioner claims that the Tenth Circuit Court of Appeals failed to recognize Utah law as expounded in Salt Lake Valley Loan and Trust Co. v. St. Joseph Land Co., 237 p. 507 (Utah 1928).

This argument is also without merit. In St. Joseph Land Co., supra, the general manager and a stock holder of a land and water company wrote several letters to a creditor during a four-year period and made various statements concerning notes which were previously owing. The creditor contended that these letters tolled the

statute of limitations. The Utah court disagreed and found that neither the manager nor the stockholder had express or implied authority by the company to write these letters. In so holding the court noted:

> Joseph testified that he had never been authorized by resolution or otherwise by the board of directors of either of the defendant corporations to write any of the letters above set out; that the letters were written by him in his individual capacity and not as general manager of either of the defendant corporations. There is no evidence that the board of directors of either of the defendant corporations directed or authorized the writing of the letters so written by Joseph.

Id. at 510.

Likewise, a stockholder and former secretary of the corporation were held not to have acted for the corporation:

> It is clear that the evidence in these cases does not justify a finding that the letter written by Julian M. Bamberger is binding upon the defendant corporations. There is no evidence

> showing or intending to show that Bamberger ever represented the defendant corporation or either of them in any business transaction whatsoever or that he had either expressed or implied authority to so act for the defendant corporation.

Id. at 510.

In the instant case, however, there has been no evidence introduced during the years of discovery showing that Wallace or Jepperson were not authorized by the corporation to send out the acknowledgement letters. These communications were not, as in St. Joseph Land Co., supra, letters written on a one-time basis not within the normal course of business. Rather, these letters were sent to the various creditors as part of the routine auditing program of the corporation and were performed as a function of the corporation and its officers. As noted by the Tenth Circuit Court of

Appeals:

> These were, after all, routine accounting statements, and certainly where he signed them as a matter of course and mailed them to others over a period of at least two years they are to be considered or to be received in evidence. Unquestionably the board of directors was familiar with this routine procedure. They certainly were familiar with the fact that these accounting statements were made at regular intervals. If the President did not have any authority to sign routine communications with the creditors, the Board would have surely made it clear that he did not have the authority to do so at the time.

634 F.2d at 1316.

Again, it should be noted that the record is void of any evidence whatsoever taken in the discovery portion of this litigation showing that Wallace or Jepperson did not have authority to execute and sign the acknowledgement letters. Whether the officers also had authority to toll the statute of limitations is irrelevant if they

are placed in a position of apparent authority by the corporation which misleads third parties into believing that such authority in fact exists. Here, the letters written to the respondent specifically acknowledge the existence of the debt for four separate years and were signed by officers of the corporations. As such, it was not Buxton's obligation to make any further inquiry into whether such communications were authorized by the board of directors, particularly since the Board had obviously acquiesced in sending such statements over this long period of time.

Thus, the United States District Court for the District of Utah and the Tenth Circuit Court of Appeals did not ignore Utah law requiring a showing of agency and authority, but merely determined that the facts and

circumstances as shown by the documents themselves and the absence of any contradictory evidence indicated either express, implied, or apparent authority sufficient to bind the corporation.

Finally, it should be observed that both lower courts found an alternate ground for not applying the statute of limitations which is separate and distinct from the statutory tolling provision of Utah Code Ann. Section 78-12-44. Both courts specifically found that the conduct of the petitioner estopped it from claiming any reliance upon the statute of limitations since the petitioner's conduct had misled and caused the respondent Buxton to delay filing his lawsuit because of the representations made by the corporation. As stated by the Tenth Circuit Court of Appeals:

By representing to Buxton that

> Diversified recognized that $20,000 debt owed to Buxton, Diversified lulled Buxton into a false sense of security. This was wholly inconsistent with the proposition that Diversified disputed the debt. Hence, Buxton saw no need to sue. It follows that the requisites of estoppel were present in this case.

634 F.2d at 1318.

The Utah Supreme Court, in Weir, supra, cited by petitioner, specifically recognized that the doctrine of estoppel can prevent the statute of limitations from taking effect. In that case the Utah Supreme Court stated:

> We think the defendants were estopped from asserting the bar of the statute. It is clearly shown that at all times the corporation and all parties concerned treated and regard the bonds as an existing liability against the corporation. They were so regarded and treated on the corporation's books and records, and all parties concerned were willing that the maturity or time of payment of the bonds be extended and kept alive. . . . Relying upon such promises and assurances the plaintiff was lulled into security that the statute of limitations would not be relied on because

> of delay of such formal action. Such promises and assurances were made by one, who, as is seen, had the power to direct the corporation in such particular. . . .
>
> * * *
>
> [B]ecause of the stated conditions and circumstances, we are of the opinion that it would be inequitable and in effect a fraud upon the plaintiff to permit the bar of the statute to be imposed, and we thus hold the defendants estopped from interposing it.

286 P. at 946.

In summary, therefore, the rules of this Court do not permit certiorari to be granted for an alleged conflict between a federal court and a state court involving state law. Even if an exception were made, however, it is clear that the Tenth Circuit Court of Appeals followed the appropriate Utah law concerning the interpretation of the tolling statute and found from the circumstances of the case that the letters sent to respondent were

both intentional and authorized. Finally, the estoppel grounds found by both courts is sufficient to sustain the decision regardless of any other claimed errors. For these reasons petitioner's Point I does not justify the granting of certiorari.

POINT III

THE DECISION OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT DOES NOT CONFLICT WITH ANY OTHER CIRCUIT COURT OPINIONS OR THE OPINION OF THIS COURT.

Petitioner asserts that certiorari should be granted because the Tenth Circuit Court of Appeals is in conflict with the Ninth Circuit Court of Appeals and the District of Columbia Circuit Court of Appeals and is also in conflict with this Court based upon the Ft. Scott v. Hickman opinion. Such argument is without merit.

First, it should be observed that

each of the decisions cited by the petitioner involved an interpretation of various state or federal statutes not involving the Utah statute now in question. While these statutes from other states are similar in their wording it is obvious that the federal court of each jurisdiction must apply the interpretation given to the state statute by the highest state court, and a conflict of federal jurisdictions concerning state laws is therefore ordinary and common place.

Second, upon analysis, the supposed conflicts in the circuits does not exist. In Moore v. Snider 109 F.2d 840 (D.C. Cir. 1940) [Petition, p. 15-16], the Court of Appeals for the District of Columbia decided a case quite different from the instant case. In Moore a store had sent a letter to a customer requesting that the cus-

tomer confirm the amount of debt owing to the store. The customer returned the letter and the store claimed an acknowledgement of the existing debt. The customer claimed, however, that she only signed the agreement because the store falsely stated to her that the only purpose of the statement was to verify the account and had no legal significance whatsoever.

The Court of Appeals for the District of Columbia held that, based upon this claim of misrepresentation in the inducement of the acknowledgement, evidence should be taken before the document itself could be found to be conclusive. Of course, this is completely different from the instant case in which the petitioner was the debtor and sent the acknowledgement of the debt to the respondent creditor. There is no claim in this

case as to any misrepresentation or fraud inducing petitioner to send the acknowledgement letters. Regardless of what the true motivations of petitioner were, the fact remains that the letters themselves were received by respondent, and he was entitled to rely upon their language.

In addition, the Circuit Court for the District of Columbia in the subsequent case of Irvine v. Gradovile, 221 F.2d 544 (D.C. Cir. 1955), held that Moore, supra, is inapplicable when no circumstances negating the language of the letter are plead and where the language of the letter manifests a clear intent to pay the debt. The court also observed that upon remand the lower court Moore, supra, found that the woman customer had indeed intended the acknowledgement to be legally binding, and, therefore,

judgment was entered in favor of the store on the original debt.

In Mann v. Pacific Land and Cattle Co., 107 F.2d 862 (9th Cir. 1939); [Petition, pp. 16-17] the Ninth Circuit found that an auditor who sent out a specific letter to a creditor did not have authority to waive the statute of limitations since such authority could only come from the president who specifically denied approving such letter. Again, the facts in that case are distinguishable from the instant case since the letter sent by the auditor was not a routine type of communication, was not signed by the president, and was not approved either directly or indirectly by the board of directors. Here, however, four separate communications were sent to plaintiff, two of which were signed by the president who had express, implied, or apparent

authority to make such statements, and all of the letters were expressly or impliedly approved by the board of directors.

Ingalls v. Ingalls Iron Works Co., 258 F.2d 750 (5th Cir. 1958) [Petition, pp. 17-18] does not concern the question of tolling a statute of limitations as conceded by the petitioner. However, in addition to this infirmity, the question there involved a reverse situation in which the creditor had sent a request for "verification" to the debtor who, upon signing the document, was claimed to have created an "account stated" rather than an open account. The court, in rejecting this argument, held that the accounting firm which sent out the request "had no authority to contract for the Company or to agree to any statement of the account with Mrs.

Ingalls." Id. at 753. This case is therefore distinguishable not only because of its subject matter, but also because of a lack of authority on the part of those sending the communication.

Likewise, petitioner's claim that the opinion of the Tenth Circuit Court of Appeals is in conflict with the opinion of this Court in City of Ft. Scott v. Samuel G. Hickman, 112 U.S. 150 (1884) is equally without merit. In that case the question was whether a committee of a city council which had made a report containing a statement of the assets and liabilities of the city in a circular which was prepared in conjunction with the report could be held to have acknowledged a debt as to certain bonds when neither the report nor the circular was sent to the plaintiff bond holder.

This Court stated:

> It is plain that the city made no acknowledgement to the plaintiff. It held no communication with him. It sent no copy of the circular letter to him. It intentionally refrained from doing so. It had a cogent reason for refraining, in the decision which had been so made in its favor. He received no circular letter from the city.
>
> * * *
>
> . . . the record, taken as a whole, did not amount to an acknowledgement to the plaintiff, as a holder of the Macadan bonds. It is not found that the plaintiff even knew of the record until after he brought this suit.

Id. at 163.

Thus, this Court held that in a case where the creditor was not notified of the claimed acknowledgement, where the acknowledgement specifically stated in its terms that it was in the terms of a compromise settlement, and where the documents themselves were never intended to be received by the creditor, such circumstances

negated any inference that an acknowledgement had been made.

In the instant case, however, the four acknowledgement letters were sent directly to the plaintiff, contained an unequivocal statement as to the amount owing, and even contained a form that the plaintiff could use to respond in agreeing to the acknowledged amount. Again, it should be noted that this Court was interpreting the Kansas statute while the Tenth Circuit Court of Appeals was interpreting the Utah statute. Thus, not only were the facts significantly dissimilar, but the statutory basis was also different, even though both statutes contain similar language. Decisions based upon variations in factual situations or in statutory language do not amount to a conflict justifying certiorari. See Harlan, Manning

the Dikes 13 Record NYCBA 541, 552 (1958); Stern, Denial of Certiorari Despite a Conflict 66 Harv. L. Rev. 465, 470 (1953).

For the foregoing reasons, petitioner's claims of conflict among the United States Circuit Court and with this Court are baseless and certiorari is not justified.

POINT IV

THE DECISION OF THE COURT OF APPEALS DOES NOT SERIOUSLY JEOPARDIZE OR IMPEDE ACCOUNTING PROCEDURES REQUIRED OF "REPORTING COMPANIES" BY FEDERAL LAW.

As the final basis for arguing certiorari petitioner claims that the decision of the Tenth Circuit Court of Appeals will seriously "jeopardize both the validity and integrity of contemporary accounting procedures." (Petition, pp. 20-24). It is difficult to ascertain what provision of

Rule 17 of the Supreme Court Rules petitioner is attempting to come under by the arguments advanced under Point III of its petition.

However, the effects which the petitioner claims will occur because of the Tenth Circuit opinion are speculative and unsupported by any fact. First, the Tenth Circuit opinion concerns only Utah law and the specific provision which allows tolling of a statute of limitations when an acknowledgement has been made. This decision would not be binding upon any other circuit court or upon any other states which do not have an identical law.

Second, the claimed conflict between independent audits and the acknowledgement of debts of the corporation can easily be eliminated by a simple disclaimer contained in the

confirmation letters stating that the letter does not admit to the existence of any debt for purposes of liability or for the tolling of any applicable statute of limitations, but only reflects a book entry by the corporation. In such an instance the creditor would clearly be put on notice that the receipt of such a letter was not tolling the statute of limitations, and he would be required to institute a lawsuit or lose his claim.

Finally, as has been observed from cases cited herein, statements signed by independent auditors are not deemed to be an acknowledgement of the corporation itself since such auditors do not have the same powers as corporate officers. An additional safeguard would be merely to have the independent accountants sign, send, and receive the confirmation letters

so that no agency can be imputed to the corporation.

Thus, the opinion of the Tenth Circuit Court of Appeals should be restricted to the facts of this particular case in which the Utah statute is being applied, and in which no disclaimer was contained in any of the letters, and the letters were signed by corporate officers of the debtor. As such, this decision has no impact whatsoever upon other corporations or accounting firms.

CONCLUSION

The three purported grounds for justifying certiorari raised by petitioner are without merit. The Supreme Court rules do not now permit certiorari to be granted because of a conflict between a federal circuit court and a state court when a federal question is not involved. In addition, the

record is clear that the Tenth Circuit Court of Appeals followed Utah law in holding that the petitioner had acknowledged the existing debt and that the acknowledgement was both intentional and authorized.

The alleged conflict among the circuits and between the Tenth Circuit and this Court is also baseless. Not only do the other decisions rendered by the various courts involve statutes other than Utah's statute, but those decisions also involved dissimilar fact situations which are easily distinguishable from the instant case.

Finally, the purported catastropic effect such a decision will have upon the reporting procedures of corporations under federal law is also an argument without substance. This decision is limited to the facts of this case, and concerns only Utah law. Accoun-

tants and corporations concerned about this decision can easily disclaim the running of a statute of limitations in the acknowledgement letter and can have the certified accountants sign the letter so that no agency question exists.

For the reasons set forth above, respondent respectfully prays that a Writ of Certiorari should not issue to the United States Court of Appeals for the Tenth Circuit to review that court's decision.

Respectfully submitted this 26th day of June, 1981.

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